IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15/06/2004

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL No.549 OF 1993

$Perumal Naicker ... Appellant

-Vs-

1.Rathina Naicker

2.Jayarama Naicker
for themselves and as
representatives of Perumbakkam
Village ... Respondents

Second Appeal preferred under Section 100 C.P.C. for the relief as
stated therein.

!For appellant : Mr.L.Mohan

^For respondents: Mr.S.Sivakumar

:JUDGMENT

The above Second Appeal is directed against the judgment and decree dated 12.8.1992 rendered in A.S.No.37 of 1988 by the Court of Subordinate Judge,Kancheepuram thereby confirming the judgment and decree dated 22.7.1987 rendered in O.S.No.215 of 1981 by the Court of Principal District Munsif, Kancheepuram.

2. Tracing the history of the above second appeal coming to be preferred by the defendant in the suit, it comes to be known that the respondents herein have filed the suit on their behalf and on behalf of the villagers of Perumbakkam praying for declaration and permanent injunction as against the appellant herein on averments such as that the defendant's grand-mother was granted patta for four cents of land in S.No.132; that after the death of his grand-mother, the defendant put up a construction in a larger extent than that of the four cents land adjoining the land in S.No.153/2 encroaching upon the extent of 27 ' x 15' pathway lying on the South thereby obstructing the general public from proceeding to the river and the graveyard which has been indicated as ABCD in the plaint plan; that on being reported against with the Revenue authorities, the District Collector, the Revenue Divisional Officer and the Tahsildar having inspected the spot, they have instructed the defendant to remove the wall and hence the suit for declaration

to the effect that the pathway in the plaint rough plan in EFGH; that it is a common pathway for permanent injunction not to put up any more construction in the portion indicated as ABCD and for the mandatory injunction for demolishing the wall put up in the ABCD of the suit property.
3. This suit would be resisted by the defendant denying the contention of the plaintiffs that he has put up the construction over and above the 4 cents of land and has encroached upon the excess land used as a pathway by the general public; that there is no such pathway at all; that the construction had been put up 40 years back; that the measurement of the property of the defendant is East-West 30 links and North-South 11 links and by virtue of the long possession and enjoyment, the defendant has become absolutely entitled to this portion and hence would pray to dismiss the suit.

4. The trial Court, having framed five issues, would permit the parties to record their evidence conducting the trial, during which, on behalf of the plaintiffs, the first plaintiff, besides examining himself as P.W.1, would also examine two more witnesses as P.Ws.2 and 3 for oral and mark three documents as Exs.A.1 to A.3 for documentary evidence, Ex.A.1 dated 22.8.1973 being the sale deed in favour of the defendant, Ex.A.2 dated 4.3.1981 being the rough sketch and Ex.A.3 being the combined sketch of Perumbakkam village, Kancheepuram Taluk of the year 1968.

5. On the part of the defendant, he would examine himself as D.W.1 and also would examine yet another witness as D.W.2 for oral evidence with no document marked for documentary evidence on his side. The Commissioner's report and sketch, both dated 26.11.1986, are marked as Exs.C.1 and C.2 as Court documents.

6. The trial Court, having traced the facts and circumstances of the case, in the manner extracted herebefore and having carefully examined them, would find, particularly with the help of the Court documents Exs.C.1 and C.2 and Ex.A.3 the combined sketch of the village, that the pathway on the Eastern side of the house of the defendant runs towards West and taking a turn at the place indicated 'BC', again goes through the place indicated as 'CDFIG' and reaching at point 'F' corner, again takes its turn on the South so as to reach the river, school and the main road.

7. The trial Court, would further find at point 'C', the breadth of the pathway is 8 feet thus belying the arguments of the defendant that there is no pathway on the South of his building; that apart from that in Ex.A.1 dated 22.8.1973 also, the pathway has been shown and according to this document, the lower Court is able to find that there is a well laid cart-track in existence on the East and on the South of the defendant's property and this fact has not been rebutted, in any manner, by the defendant.

8. The trial Court, would also find from the oral evidence adduced on the part of the defendant that his pleading to the effect that the building was constructed 40 yeas back is a wrong statement since he himself had admitted that the same had been constructed only in the year 1976 and therefore there had been no construction prior to 1976 and therefore the defendant cannot put up the plea of adverse possession. Ultimately, having

further discussions, the trial Court would ascertain the encroached portion of the pathway by the defendant as 15 feet and it is essential for the general public for gaining access to the school, river, grave yard etc. as it comes to be disclosed from the evidence of P.Ws.2 and 3 and therefore the trial Court, ultimately, would arrive at the irresistible conclusion to accept the case of the plaintiff so as to pass a decree in the suit as prayed for by the plaintiff.

9. Aggrieved, the defendant has preferred an appeal before the Court of Subordinate Judge, Kancheepuram and the first appellate Court also, having clearly gone into the facts and circumstances of the case and having framed four points for proper consideration of the appeal and having its own discussions in appreciation of the evidence placed on record before the trial Court, would ultimately concur with the trial Court's decision thus dismissing the appeal preferred by the defendant as a result of which, left with no other choice, the defendant has come forward to prefer the above second appeal on certain grounds as brought forth in the grounds of appeal and this Court has admitted the same for determination of the following Substantial Questions of Law:

1. Whether the suit for mandatory injunction for removal of obstruction of public pathway - a public nuisance - filed in representative capacity is maintainable as per Section 91 C.P.C.?

2. Whether the declaration of Court below as to existence of public pathway is sustainable even without an issue?

3. As claim to use of pathway was not on the basis of any easement or on suffering special damage, whether the plaintiffs have locus standi in maintaining the suit?

10. So far as the first substantial question of law pertaining to Section 91 of the C.P.C. is concerned, it deals with "public nuisance" which is the combination of a civil and criminal characters and no mention need be necessary that under both civil and criminal forums, the public nuisance could be dealt with for a ctions and prosecutions. "Nuisance" is an obstruction, risk or injury caused to any person and if the same is caused in a public place it becomes "public nuisance". Such a wrongful act affecting the general public, according to Section 91 CPC, could be challenged or testified filing a suit for declaration and injunction and for such other reliefs by the Advocate General or with the leave of the Court by two or more persons though no special damage has been caused to such persons by reason of such public nuisance.

11. However, clause (2) of Section 91 C.P.C. makes it clear that this Section would not limit or otherwise affect any right of suit which may exist independently of its provisions thereby meaning that if any individual gets affected by such public nuisance being caused, he or she, would have the same right to file a suit for declaration and injunction and for mandatory injunction and therefore since the plaintiffs in the suit being the neighbours, they are personally affected by the nuisance created by the

defendant, which is also bound to affect the general public from freely making use of the pathway-cum-cart track for reaching important places such as the school, river and the graveyard and such other places of vital importance and therefore it cannot be said that no individual will have the right to question the validity of such a wrongful act committed on the part of persons like defendants particularly in view of the fact that Section 91 CPC does not create a bar on any individual from resorting to the Court for relief in such matters and therefore this substantial question of law regarding the capacity of the plaintiffs to maintain a suit of this character has to be decided only against the appellant and the same is decided accordingly.

12. Consequently, the substantial questions of law No.2 and 3 have also to be decided answering that in the facts and circumstances of the case, the declaration of the Court below as to the existence of the public pathway is irresistible and that the plaintiffs' have the locus standi to maintain the suit thus deciding these two substantial questions of law Nos.2 and 3 also against the appellant and in favour of the respondents/plaintiffs and hence the following judgment:

In result,
(i) the above Second Appeal does not merit acceptance and the same is dismissed accordingly.
(ii) The judgment and decree dated 12.8.1992 rendered in A.S.No.37 of 1988 by the Court of Subordinate Judge, Kancheepuram thereby confirming the judgment and decree dated 22.7.1987 rendered in O.S.No.215 of 1981 by the Court of Principal District Munsif, Kancheepuram is hereby confirmed.

However, in the circumstances of the case, there shall be no order as to costs.

Index: Yes
Internet: Yes

Rao

To

1.The Subordinate Judge,
Kancheepuram.

2.The Principal District Munsif,
Kancheepuram.

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